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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 372

HORACE HART,

Petitioner,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

REPLY MEMORANDUM FOR PETITIONER

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WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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Petitioner respectfully believes the arguments raised by Respondent to oppose the granting of certiorari are without merit. To aid this Court in determining whether to grant the writ, the Petitioner will briefly state the basis for his belief.

A. The Appeal to the Fifth Circuit was Duly Perfected.

In an unmeritorious effort to discourage the granting of certiorari, Respondent denies that the jurisdictional notice of appeal was timely filed. Respondent arrives at this conclusion through the device of taking mutually inconsistent positions.

The sequence of events is set out in the Second Notice of Appeal.

1. June 16, 1961, entry of final judgment.

2. June 23, 1961, Petitioner's Motion for New Trial.

3. July 14, 1961, Application to Withdraw Motion for New Trial.

4. July 14, 1961, First Notice of Appeal.

5. July 19, 1961, Order Granting Withdrawal of Motion for New Trial.

6. July 24, 1961, Second Notice of Appeal.

Petitioner agrees with Respondent that the filing of the timely motion for new trial suspends the time for filing the Notice of Appeal. Thus, regardless of whether the withdrawal of the motion for new trial commences the appeal time to run from the date filed or from the date the trial court acts, the Second Notice of Appeal was timely. If the filing of withdrawal of the motion for new trial could somehow retroactively affect the suspension of the time for appeal, then the First Notice of Appeal (filed subsequent to the withdrawal) is timely.

Under Respondent's theory the filing of the first Notice of Appeal was a nullity because the motion for new trial *continued to exist* after the filing of the withdrawal, and then, contradictorily, Respondent asserts that the second Notice of Appeal was untimely because the motion for new trial in effect *never existed*. Under the divergent constructions of the federal rules put forth by the Respondent it would be *impossible* to give a timely Notice of Appeal in the instant case. Surely Respondent should not be rewarded for such incon-

sistency. More importantly Respondent's novel construction does not comport with the requirement in Rule 1 that the Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Respondent cites some 18 cases; the *holding* of not one case concurs with Respondent's conclusion.

B. Lack of Federal Jurisdictional Amount was Presented to the District Court.

Contrary to assertions throughout the Respondent's brief, the district court had full and ample opportunity to sustain Petitioner's position for over a year; from July 18, 1960 (Motion to Dismiss), through July 19, 1961 (order entered approving withdrawal of Motion for New Trial). Any time during this period the district court had the power, and indeed the duty,[1] to dismiss for want of the jurisdictional amount.

Petitioner withdrew his motion for a new trial because he decided to prosecute only his jurisdictional objections on appeal. Counsel for the Respondent had been previously informed that Petitioner would seek review by the Supreme Court. The District Judge knew when he acted on the motion for new trial that the Petitioner intended to appeal. The reason for the appeal is simple: Petitioner lost on his jurisdictional argument in the District Court.

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[1] E.g., *Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U. S. 379; American Fire & Cas. Co. v. Finn, 341 U. S. 6.*

C. Petitioners Consent to Trial in Federal Court Did Not Waive any Jurisdictional Defects nor Impair the Conflict with McNutt v. General Motors Accept. Corp., 298 U. S. 178.

The Defendant-Petitioner's consent to trial in federal court was about as freely given as the marriage vows to a shotgun wedding. He had virtually no choice. Respondent states "Petitioner was unable to obtain a trial setting in the state court as rapidly as in the federal court." (Respondent's Brief, p. 21, n 2). The statement is a cruel half-truth. Petitioner could not get his case tried in state court because of the *Respondent's plea in abatement.* (See Appendix E, Petition for Certiorari.) Petitioner *still* is unable to try his suit in state court because of the Respondent's plea in abatement. The injured workman surely should not be penalized for accepting a federal trial as against no trial.

Although the Petitioner consented to the exercise of Federal jurisdiction,[2] the Petitioner did not amend his answer which expressly denies Respondent's allegation of jurisdiction. It was the Respondent who has invoked federal jurisdiction and who, under the *McNutt v. General Motors Accept. Corp., 298 U. S. 178,* has the burden to show federal jurisdiction. And the Respondent, in spite of much verbage to the contrary, has failed to point to any place in the entire record where the Petitioner at any time during the pendency of the federal district court suit ever claimed more than $6,310. True, the

[2]Federal Jurisdiction can not be waived, see cases n 1, *supra.*

Petitioner extra-judicially told the Accident Board he hurt his back—but he never claimed any specific sum of money. Moreover, this Court stated that the amount originally claimed before the Accident Board is not controlling for *federal* jurisdiction. *Horton v. Liberty Mutual Ins. Co.*, 367 U. S. 348 at 353.

D. Petitioner is Entitled to Present the Abstension Question.

Respondent's contention that the Petitioner is not entitled to present the question of federal abstension is not supported by any authority. Indeed, it is contrary to *Chicago, B. & Q. RR. v. North Kansas City*, 276 F. 2d 932 (8th Cir. 1960). The Eighth Circuit *held* that even the party who invoked federal jurisdiction (through removal) and who lost on the merits was entitled to initially raise the abstention doctrine at the appellate level.

E. This Case Will Determine Whether the Federal District Courts must Entertain Jurisdiction Over Hundreds of Compensation Suits.

Respondent would have this Court believe that although the compensation-insurers took the time and effort to remove compensation cases at the rate of some 1100 a year in Texas alone; that the insurers will not now engage in races to the forum. Considering the Respondent's own race, we submit his views should be treated with some suspicion.

The reason for the drop in compensation cases following the 1958 amendments is because of such rulings by the district courts as reported in *National Surety Corporation v. Chamberlain, 171 F. Supp. 591 (N. D. Tex. 1959)*—a result which may be short-lived in view of *Horton v. Liberty Mutual Ins. Co., 367 U. S. 348.* (Respondent cites statistics from but one division—there are seven divisions in the Northern District of Texas and four Districts in Texas.)

The present *Hart* case will open the sluice gates of federal jurisdiction even more extensively than *Horton.* Under Respondent's position the injured employee who files with the Industrial Accident Board a claim that merely describes the nature of his injury, *irrevocably* has given the insurer the right to claim the eixstence of federal jurisdictional amount. A substantial number of the 60,000 plus claims annually filed with the Board are similar in form to Hart's.

Respondent's solicitous concern for this Court in urging that certiorari be denied is not reflected in its desire to inundate the inferior federal courts with hundreds of such cases. Besides these compensation suits, the decision by this Court will effect all forms of litigation where jurisdictional amount is at issue. Thus, Petitioner respectfully submits that the instant case will directly effect a more substantial number of cases than perhaps any case this Court has decided in the past five years.

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[3]See Petition for Certiorari, p. 6, n 3.

F. Declaratory Judgment Revisited.

To negate the impact that Respondent's cau of action is only to set aside a $910 award, the Respondent at page 18 of his Brief in Opposition makes the following ad mission: "Respondent sued to be relieved of a maximum po ntial liability of $14,035, regardless of any counterclaimed a mount." Once again a respondent-insurer seeks to uphold jurisdictional amount as though his action were a declara ry judgment proceeding. Respondent's complaint does not s pport such a theory. And necessarily, Respondent's suit eit r *is or is not* a declaratory judgment action. If it is, the Respondent should be given the opportunity to explain i race to the forum in view of the following statement by Professor Borchard, the father of the declaratory judgm nt act.

> "In several recent cases the federal c rts have declined to exercise jurisdiction over declara ry actions on the ground * * * that an unseemly scramb by attorneys to get into the federal court and avoid a state trial, which would be speedier, should be discou nanced. This exercise of discretion has seemed to some distinguished insurance lawyers as unauthorized by the statute or the law, and the reiterated statements of sev al courts that the grant of a declaratory judgment is di cretionary has been severely criticized.
>
> "But the courts are right and the c tics wrong." *Borchard, Declaratory Judgments* 312 (2d. ed. 1941.)

Finally, to sustain Respondent's position th the jurisdictional amount is present in its suit to set aside a $910 award because it "sued to be relieved of a maximum tential liability of $14,035, regardless of any countercla ned amount" would be tantamount to repealing the jurisdi ional statute.

CONCLUSION

The Petitioner and hundreds of other injured workmen need the help of this Court. In all humility they need that help now.

Respectfully submitted,

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